Supreme Court, U.S.
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No. 03-129

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In The
Supreme Court of the United States

PUERTO RICO AND THE CARIBBEAN CARDIOVASCULAR CENTER CORP.,

Petitioner,

v.

FRESENIUS MEDICAL CARE CARDIOVASCULAR CENTER CORP.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Under this Court's decisions in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), and *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997), must federal courts give substantial deference to a state's legislative and policy decisions in structuring entities that would qualify as arms-of-the-state and thus be entitled to Eleventh Amendment immunity?

2. To the extent that *Hess* has been interpreted by the courts of appeals to give dispositive weight to whether a state would be responsible for the financial obligations of one of its entities, is such consistent with this Court's later rulings emphasizing the dignity interest of arms-of-the-state not being haled into federal court?

3. Should a specialized medical care, research and training facility, established by a state legislature, fully integrated into a state's public health care system, and at least to some degree funded and indemnified by a state government, be deemed an arm-of-the-state for purposes of Eleventh Amendment immunity?

LIST OF PARTIES BELOW

The parties to this case below are as reflected in its caption.

RULE 29.6 NOTICE

Petitioner, Puerto Rico and the Caribbean Cardiovascular Center Corporation, is a governmental entity created by the Commonwealth of Puerto Rico, and has no shareholders or parent corporations.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Puerto Rico and the Caribbean Cardiovascular Center Corporation, respectfully prays that a writ of certiorari issue to review the March 6, 2003, judgment and opinion of the U.S. Court of Appeals for the First Circuit in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the First Circuit, of March 6, 2003, *Fresenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico and the Caribbean Cardiovascular Center Corp.*, Docket No. 02-1763, is reported at 322 F.3d 56 (1st Cir. 2003), and is reprinted at App. 2a. The First Circuit's denial on en banc review was issued on April 25, 2003, and is reprinted at App. 1a.

The First Circuit opinion was issued in response to an appeal of two unreported opinions and orders by the U.S. District Court for Puerto Rico of March 18, 2002, reprinted at App. 38a, and of May 7, 2002, reprinted at App. 54a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the U.S. Court of Appeals for the First Circuit of March 6, 2003. The First Circuit denied a petition for rehearing and suggestion for rehearing en banc on April 25, 2003. App. 1a. The U.S. Supreme Court has jurisdiction to review cases from federal courts of appeals by virtue of 28 U.S.C. § 1254(1) (2000).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This Petition implicates the manner in which state entities are endowed with arm-of-the-state status and immunity under the Eleventh Amendment: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST., amend XI.

The particular state entity in question here is the Puerto Rico and the Caribbean Cardiovascular Center Corporation, the organic statute for which, 24 P.R. Laws Ann. §§ 343-343k (2000), is reprinted at App. 58a.

STATEMENT

1. a. In 1986, the Commonwealth of Puerto Rico legislature enacted a statute creating the Petitioner, Puerto Rico and the Caribbean Cardiovascular Center Corporation ("PRCCCC"). 24 P.R. Laws Ann. §§ 343-343k (2000); App. 58a. PRCCCC was established as a "public corporation" and was legislatively authorized to "function as an entity which is independent and separate from *any other* agency or instrumentality of the Government of the Commonwealth of Puerto Rico...." 24 P.R. Laws Ann. § 343a (2000) (emphasis added); App. 58a.

The broad purposes of the PRCCCC were to have "the responsibility of framing or executing public policy with regard to the planning, organization, operation and administration of the cardiovascular services to be provided in Puerto Rico." 24 P.R. Laws Ann. § 343b (2000); App. 58-59a. PRCCCC was also given the function of coordinating the Commonwealth's

cardiovascular health policies by liaising with the Commonwealth's Department of Health, the Medical Sciences Campus of the University of Puerto Rico, the Medical Services Administration (all government entities) and the private sectors involved in providing cardiovascular care in Puerto Rico. Id.; App. 59a. These broad purposes and functions were pursuant to the Commonwealth of Puerto Rico's Constitution which provides that Commonwealth citizens have the right to "a standard of living adequate for the health and well-being of himself and of his family, and especially to . . . medical care and necessary social services." P.R. CONST. Art. II, § 20 (excepted from the approval of the Constitution by Joint Resolution of Congress of July 3, 1952, c. 567, 66 Stat. 327).

The officially enacted Statement of Motives for the PRCCCC Act specifically indicated that among the primary functions of the entity was "the training of professionals in the cardiovascular field" and "to encourage professional excellence in the formation of health professionals in the area of cardiovascular disease, maintaining professional quality through continuing education programs in this dynamic field of modern medicine." Act of June 30, 1986, No. 51, 1986 P.R. Laws 171. The statutory preamble also indicated that the PRCCCC would "have a research function with special emphasis on those most frequently encountered cardiovascular diseases in Puerto Rico in order to develop methods, techniques and treatments to confront them more adequately." Id. In short, the PRCCCC was intended "for the purpose of eliminating or mitigating the ailments of cardiovascular patients as well as to promote teaching, study, research and the intellectual development of the health care professionals in this highly specialized field of medicine." Id. at 171-72.

PRCCCC was given broad powers by the

Commonwealth legislature. Some of these were consistent with the establishment and operation of a cardiovascular hospital intended to serve Commonwealth citizens, particularly that large percentage which is indigent. See 24 P.R. Laws Ann. §§ 343b (b), (c) (d) & (l) (2000); App. 59a-60a. But other of the enumerated powers were clearly in line with the organization of a governmental unit. See id. §§ 343b (e) - (k), (m) - (r) (2000); App. 59a-61a. PRCCCC, by statute, was exempted from "all types of taxes, duties, imposts or fees, including license fees, imposts or those imposed by the Commonwealth of Puerto Rico or any of its political subdivisions, including all of its operations, movable or immovable properties, capital, income and surplus." 24 P.R. Laws Ann. § 343e (2000); App. 63a. The PRCCCC's premises are located on Commonwealth property. 24 P.R. Laws Ann. §§ 343f & 343g (2000); App. 64a. The enabling act for the PRCCCC takes care to exempt the entity from certain laws governing Puerto Rico governmental units, on the assumption that without such a provision these would normally apply to it. 24 P.R. Laws Ann. § 343j (2000); App. 65a. The PRCCCC was also given the authority to issue bonds, backed by the PRCCCC's assets, including real property (owned by the Commonwealth), and the interest on such bonds was declared to be tax exempt. See 24 P.R. Laws Ann. § 343k (2000); App. 65a-67a.

b. By statute, the PRCCCC is placed under the control of a Board of Directors. The Board is composed of seven voting members of which three serve by virtue of their office: the Secretary of Health of Puerto Rico, the Rector of the Medical Sciences Campus of the University of Puerto Rico, and the Executive Director of the Commonwealth of Puerto Rico Medical Services Administration. The four remaining members are appointed by the Governor for four-year terms, and the seats

are allocated based on the experience and qualifications of the members. The Commonwealth's Secretary of Health serves as Chairman of the Board, and that official designates the other Board officers. See 24 P.R. Laws Ann. § 343c (2000); App. 61a-62a. The Board designates the Executive Director and Medical Director of PRCCCC. Id.

The PRCCCC Board is obliged, by statute, to "submit an operating expenses and capital investments budget to the Legislature, through the Office of the Governor, which should contain a statement of estimated income and a disbursement program based on a working plan and the services to be rendered by the Corporation." 24 P.R. Laws Ann. § 343h (2000); App. 64a. Additionally, the PRCCCC must submit semiannual reports to the Commonwealth Governor, and PRCCCC is subject to audit by the Commonwealth's Comptroller. See 24 P.R. Laws Ann. § 343i (2000); App. 65a. PRCCCC Board members are removable at will by the Commonwealth Governor.

c. The fiscal history of PRCCCC is admittedly complex, and subject to some dispute.[1] For purposes of the

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[1] For clarity, the statistics presented here are drawn from the district court's findings of fact and the court of appeals' opinion. Petitioner believes that some of these figures are clearly erroneous, and the legal conclusions drawn therefrom concerning PRCCCC's status constitute legal error. These errors tended to substantially understate the PRCCCC's financial dependence on Commonwealth funding, including contributions made by Puerto Rico executive branch and agencies (and not just direct legislative appropriations), as well as funds from government indemnifications and reimbursements to the PRCCCC (erroneously disregarded as insurance payments). All told, Petitioner would submit that Puerto Rico currently provides well over half of the PRCCCC's operating

present Petition, it suffices to note that PRCCCC has, for the past years, operated at a substantial budget deficit, with expenses exceeding operating revenues by many millions of dollars. See App. 32a, 35a, 45a. Indeed, it may well have been contemplated at the time that PRCCCC was created that it would incur such deficits and that the Commonwealth of Puerto Rico would make up any shortfalls from its budget. In the organic statute establishing the PRCCCC, an initial appropriation to PRCCCC's working capital was made from the Commonwealth budget in the amount of $500,000. Moreover, the statute provided that "[t]he funds needed in subsequent years to carry out the purposes of this act shall be consigned in the General Expense Budget of the Government of Puerto Rico." Act of June 30, 1986, No. 51, § 13, at 170, noted at 24 P.R. Laws Ann. § 343; App. 68a.

Also undisputed is that, prior to 1993, PRCCCC received all its funding from the Commonwealth, and that from 1993 to 2001, at least an average of 14 percent of its total revenues from direct legislative appropriations from the Commonwealth of Puerto Rico, or $51 million in appropriations out of a total of $373 million in revenues. App. 34a, 46a. Direct appropriations accounted for over 21 percent in some years, including FY 1993 and 1994. Id. This figure is understated because the Commonwealth has delayed collection of, or outright forgiven, the PRCCCC's other debts, including the rental of property owned by the government. Additionally, this figure does not take into account the reimbursements and indemnifications the Commonwealth offers to the PRCCCC. When these are added to the total, the Commonwealth's contribution to the PRCCCC's operating

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budget.

revenues ranged between 64 percent (in FY 1993 and 1994) to 26 percent (in FY 2000 and 2001). See App. 34a-35a.

2. a. The underlying facts that gave rise to this Petition involve a contractual dispute for the provision to PRCCCC, by certain predecessor entities of Fresenius Medical Care, of perfusion services using artificial pumps in open-heart surgeries. Fresenius sued PRCCCC in federal court for breach of contract and the covenant of good faith and fair dealing, and sought $7 million in damages as well as specific performance and a declaratory judgment. App. 38a. PRCCCC moved to dismiss Fresenius's suit, under Fed. R. Civ. P. 12(b)(1), owing to PRCCCC's arm-of-the-state status and its consequent Eleventh Amendment immunity to suit in federal court. App. 38a, 40a.[2]

The district court denied PRCCCC's motion to dismiss on Eleventh Amendment grounds.[3] App. 52a. After holding that Eleventh Amendment immunity extended to Puerto Rico, App. 44a, the district court applied the First Circuit's test from *Metcalf & Eddy v. Puerto Rico Aqueduct & Sewer Auth.*, 991

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[2] In ruling on PRCCCC's Rule 12(b)(1) motion, the district court looked outside the pleadings to find facts relevant to PRCCCC's status. App. 40a. Somewhat inexplicably, the court of appeals treated PRCCCC's motion as brought under Rule 12(b)(6) and, moreover, converted it to a motion for summary judgment under Rule 56. App. 22a & n.13.

[3] Other grounds for dismissal, including Fresenius's lack of standing and improper service of PRCCCC were also rejected by the district court, App. 41a-43a, and although the latter was renewed before the court of appeals, these issues are not placed before this Court in this Petition.

F.2d 935 (1st Cir. 1993), to conclude that PRCCCC received insufficient funding from the Commonwealth to be considered an arm-of-the-state for Eleventh Amendment purposes, and that even though PRCCCC was running operating deficits that the Commonwealth was statutorily obliged to cover, the district court held that under First Circuit authority, and this Court's precedents, such a duty was not enough to trigger arm-of-the-state status. App. 47a-48a (citing *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)).

The district court then considered other factors bearing on PRCCCC's legal status. As for PRCCCC's functions, the district court held, App. 49a-50a, again based upon First Circuit cases predating this Court's decisions in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), and *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997), that operating a hospital was essentially a private business, and specifically disavowed the Puerto Rico legislature's assignment to PRCCCC of "the responsibility of framing or executing public policy with regard to . . . cardiovascular services to be provided in Puerto Rico." 24 P.R. Laws Ann. § 343b (2000); App. 58a. Likewise, the district court questioned the amount of authority Puerto Rico's Governor exercised over the PRCCCC Board of Directors, despite the fact that three of its members (including its chair) are gubernatorial political appointees or cabinet members. App. 51a. The district court also concluded that PRCCCC had access to outside sources of funding, and that even though Puerto Rico's credit was at stake in such transactions, such did not lead to a finding of arm-of-the-state status. App. 51a-52a.

On PRCCCC's motion for reconsideration, the district court criticized PRCCCC's reliance on cases decided by this

Court after the First Circuit's ruling in *Metcalf & Eddy*, including *Hess*, and the district court ruled that *Hess* was inapposite to a case involving something other than a bi-state compact entity. App. 55a-57a. The district court reaffirmed its ruling that PRCCCC's functions in operating a cardiovascular health clinic were traditionally a private sector activity, and thus effectively disqualified it as an arm-of-the-state. App. 56a-57a.

b. PRCCCC took an interlocutory appeal of the denial of its arm-of-the-state status, as per this Court's holding in *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), and the First Circuit affirmed. App. 37a. The court of appeals took no issue with extending Eleventh Amendment immunity to Puerto Rico and its arms-of-the-state, see App. 7a, and articulated the question as being one of reconciling its own arm-of-the-state jurisprudence with that of this Court in the wake of *Hess* and *Regents of the Univ. of Cal.* App. 2a ("This case . . . .causes us to reshape this circuit's arm-of-the-state test in light of intervening Supreme Court precedent."); App. 21a. The court of appeals then proceeded to canvass the different sorts of state entities notionally entitled to Eleventh Amendment immunity, and this Court's divergent treatment of bodies within each category. App. 7a-9a.

Looking at the larger canvass of this Court's Eleventh Amendment jurisprudence, the First Circuit articulated a number of reasons why a federal court should be reticent in granting arm-of-the-state status to a particular state entity, App. 12a-14a, and essentially fashioned a judicial presumption against arm-of-the-state status. Moreover, the First Circuit repeatedly observed in its opinion that the burden of proof is on the entity claiming arm-of-the-state status to carry its

burden. See App. 7a, 11-12a, 26a, 29a n.20, 33a; but see 40a (where the district court reached an opposite conclusion).

The First Circuit then turned to analyzing the impact of *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), on the status of special-purpose public corporations. The court of appeals characterized the *Hess* analysis as a two-step process in which, first, the structure of an entity would be assessed to see if a state substantially controlled the body, and, if such yielded no definitive result, then, second, the impact of a judgment on the state's treasury would be assessed. See App. 14a-16a. The First Circuit held that *Hess*'s two-step analysis was as applicable to what it called "intra-state entities," App. 17a, as to the bi-state compact entities at issue in *Hess*. App. 18a-19a (citing *Auer v. Robbins*, 519 U.S. 452, 456 n.1 (1997)). As for whether the ruling in *Hess* was viable in the aftermath of this Court's rulings in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and *Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743 (2002), which both emphasized the dignity interest of states in resisting federal court jurisdiction, the First Circuit held that "*Hess* binds us and has not been overruled. . . . [and we] must follow it until the Supreme Court decides otherwise." App. 20a-21a.

Ultimately, the First Circuit held that the arm-of-the-state standard of its previous decision in *Metcalf & Eddy* was consistent with *Hess* and remained applicable in cases involving special-purpose public corporations. App. 19a, 21a, 22a. In turning to the structure and functioning of the PRCCCC, the First Circuit noted that the enabling act for the entity, 24 P.R. Laws Ann. § 343 et seq. (2000); App. 58a, presented a "closer case" for PRCCCC's arm-of-the-state status than did the entities at issue in earlier First Circuit decisions, including *Metcalf & Eddy*. App. 24a. Nonetheless,

the court rejected a construction of 33 P.R. Laws Ann. § 3022 (2000), that would have qualified PRCCCC as an arm of the Commonwealth government. App. 24a-26a. Even more significantly, the First Circuit concluded that the PRCCCC's mission of providing health care services was assimilable to a "private sector hospital," App. 29a, and despite the PRCCCC's statutorily-conferred policy responsibilities, the Circuit concluded that these were insufficient indicia of governmental functions. And as for the Government of Puerto Rico's control over PRCCCC, the First Circuit concluded that there were "indicia of control, but hardly determinative in view of the [PRCCCC's] statutory structure." App. 30a. The court of appeals appeared to reach this holding under the majority opinion in *Hess*, although it expressed some concerns that a different outcome might obtain under the *Hess* dissent. Id. n.21 (citing and quoting *Hess*, 513 U.S. at 61 (O'Connor, J., dissenting)).

The First Circuit concluded that "[w]e cannot say that the indicia all point in the direction of PRCCCC being an arm of the state and so we reach the second stage of the analysis," id., whether the Commonwealth treasury would effectively be responsible for a judgment against PRCCCC. Once again, the court of appeals diminished the effect of statutory language that appeared to pledge Commonwealth legislative appropriations to cover PRCCCC debts. App. 32a-33a (discussing P.R. Act of June 30, 1986, No. 51, at 170, § 13). In examining the PRCCCC's fiscal history, the court of appeals concluded that Commonwealth financial support of PRCCCC had dropped over the years, and that total Commonwealth funding in FY 2000 and 2001 amounted to 26 percent of PRCCCC's revenue. App. 34a-36a. The First Circuit held that

> The fact that PRCCCC receives significant, but diminishing, state funding (now less than thirty percent counting all sources, including insurance) is simply not enough to enable it to claim Eleventh Amendment immunity. *Mt. Healthy*, 429 U.S. at 280. In the end, PRCCCC's argument is simply that a judgment would deplete its operating funds, that the Commonwealth might choose to rescue it, and that this would indirectly deplete the state treasury. We rejected this very argument in *Metcalf & Eddy*, 991 F.2d at 941, and do so here.

App. 36a. The court of appeals thus held that PRCCCC is not an arm of the Commonwealth government and not entitled to Eleventh Amendment immunity in federal court. App. 37a.

REASONS FOR GRANTING THE PETITION

THE CIRCUITS ARE IN SUBSTANTIAL DISARRAY AS TO THE PROPER APPLICATION OF THIS COURT'S ARM-OF-THE-STATE JURISPRUDENCE

This Petition seeks the Court's guidance in resolving a vexatious and recurring aspect of its sovereign immunity jurisprudence: the qualifications for a governmental entity to be an arm-of-the-state for purposes of invoking the state's Eleventh Amendment immunity in federal court. It is an issue that this Court has been required to substantially address twice in the past decade – in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), and *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997). Now, because of a sharp split in the courts of appeals' interpretation of these decisions, as

well as of the Court's most recent Eleventh Amendment pronouncements, it is necessary again for the Court to clarify the general principles and standards by which special-purpose public corporations are to be granted or denied arm-of-the-state status. Particularly in need of settlement are the considerations to be applied by federal courts in relation to those state entities involved in the provision of medical services and the development of sensitive state policies in the health care area.

The First Circuit ruling for which review is sought here was that despite the fact that the Puerto Rico and Caribbean Cardiovascular Center Corporation (PRCCCC) was established by the Commonwealth of Puerto Rico legislature as an "agency or instrumentality" of the Commonwealth, 24 P.R. Laws Ann. § 343a (2000); App. 58a, is fully integrated into the Commonwealth's public health care system, and is substantially funded and indemnified by the Puerto Rico government, this did not suffice to characterize it as an arm-of-the-state. Indeed, the First Circuit went so far as to systematically place four insurmountable hurdles for a state entity to qualify as an arm-of-the-state. These newfangled doctrinal requirements for arms-of-the-state are in dramatic tension with this Court's jurisprudence. Moreover, each of them illustrates a growing split in the circuits in the handling of arm-of-the-state cases.

1. a. First, the court below appeared to give not a whit of deference to the Commonwealth of Puerto Rico's own characterization of the PRCCCC as its agency or instrumentality, and endowed with the Commonwealth's Eleventh Amendment immunity. The First Circuit not only chose to read the relevant PRCCCC enabling statute in a narrow fashion, dismissing the relevance of no less than three

distinct provisions, see App. 24a-26a (interpreting 33 P.R. Laws Ann. § 3022 (2000)); 27a-28a (glossing P.R. Const. art. II, § 20); 32a-33a (construing Act of June 30, 1986, No. 51, at 170, § 13), it essentially imposed a clear statement requirement for state legislatures to denominate public service corporations as arms-of-the-state. Indeed, the court of appeals at some length, App. 12a-14a, seemed bent on ordaining a presumption against finding an entity to be an arm-of-the-state, in spite of its acknowledgment that this Court's ruling in *Hess* did not require such a result, and, moreover, that consistent with this Court's later pronouncements in such cases as *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), and *Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743 (2002), a presumption in favor of arm-of-the-state status was consonant with the dignity interest of states. App. 17a-19a.

Although Petitioner is by no means suggesting that federal courts should give complete and total deference to state legislative and policy determinations in arm-of-the-state determinations, the First Circuit certainly erred in veering to the opposite extreme of extending virtually no solicitude to the state's own characterization of the entity. This is inconsistent with this Court's admonition in *Regents of the Univ. of Cal.*, that

> [u]ltimately, of course, the question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State, and therefore "one of the United States" within the meaning of the Eleventh Amendment, is a question of federal law. But that federal question can be answered only after considering the provisions of state law that define the agency's character.

519 U.S. at 430 n.5. Nonetheless, this court has never offered

a standard of deference by which state law will be "consider[ed]" in the context of arm-of-the-state inquiries. In this case, the First Circuit appeared, at every material step in the analysis, to substitute its judgment for that of the legislature and executive officials of the Commonwealth of Puerto Rico as to the public character of the PRCCCC. Indeed, it seems that the First Circuit has impliedly declined to accept that the Commonwealth's statutory ordering of its governmental programs and instrumentalities is entitled to the same substantial deference – nay, the same dignity – as those of States of the Union.

b. The First Circuit's methodology stands in sharp relief with the practice of other circuits, which routinely grant a measure of appreciation to a state's own legislative and judicial characterization of an entity. In *Harter v. Vernon*, 101 F.3d 334 (4th Cir. 1996), the Fourth Circuit held that "[a]s a matter of federal law, a court may consider both the relevant state statutes, regulations, and constitutional provisions which characterize the entity, and the holdings of state courts on the question. A federal court may 'give deference to the rationale used by a state court,' but the holding is not dispositive as a matter of federal law." Id. at 342 (citations omitted) (quoting *Ram Ditta v. Maryland Nat'l Capital Park & Planning Comm'n*, 822 F.2d 456, 460 (4th Cir.1987)); see also *Franchesci v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1994); *Mitchell v. Los Angeles Comm. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir.1988); *Duke v. Grady Mun. Schs.*, 127 F.3d 972, 978 (10th Cir. 1997).

The First Circuit's approach, of denying any deference to the Commonwealth's own determinations and declarations as to the status of legislatively-created entities, is certainly suspect in light of the jurisprudence of other courts of appeals. But it was also coupled with a repeated insistence that the entity seeking arm-of-the-state status discharge a high burden

of proof. See App. 7a ("the entity asserting Eleventh Amendment immunity[] bears the burden of showing it is an arm of the state."), 11a-12a, 26a ("It is PRCCCC's burden to [produce relevant court opinions showing a grant of arm-of-the-state status]"), 29a n.20 ("PRCCCC, which bears the burden of proof, offers only inadmissible hearsay evidence on this point."), 33a ("There is, moreover, no evidence in the record (and the burden is on PRCCCC) that PRCCCC took any steps to comply with this requirement. . . ."). This combination of requirements – a lack of deference and an imposition of stringent burden of proofs – while perhaps singly unobjectionable, together create an intolerable hardship on state entities in arm-of-the-state cases, and raises the specter of an affront to the dignity interest of states so often pronounced by this Court.

2. Second, the First Circuit's application of the *Hess* test for arms-of-the-state was manifestly flawed. The court of appeals appeared to require that, in the first step of the analysis, *all* of the indicia in determining whether an entity was effectively controlled by a state government had to point in favor of arm-of-the-state status before such would be conferred. App. 30a ("We cannot say the indicia all point in the direction of PRCCCC being an arm of the state and so we reach the second stage of the analysis.").

a. Nothing in *Hess* suggests the Court intended such an all-or-nothing analysis. See 513 U.S. at 44, 47. *Hess* concerned a bi-State Compact entity, implicating special federalism concerns under the Constitution's Compact Clause, and thus accounting for the Court's presumption against such entities being granted arm-of-the-state status. See id. at 40-42. The application of the *Hess* test to intra-state special-purpose public corporations would be much more problematic if it

demanded, as the court below appeared to hold, a confluence of all factors of control in demonstrating arm-of-the-state status. Likewise, nothing in this Court's previous ruling in *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977), suggests such a result, as other courts of appeals have recognized. See *Sturdevant v. Paulsen*, 218 F.3d 1160, 1166 (10th Cir. 2000); *Duke v. Grady Mun. Schs.*, 127 F.3d 972, 974 n.3 (10th Cir. 1997).

Nonetheless, one court of appeals' prediction in 1995 that this Court's opinion in *Hess* "is certain to generate confusion," *Gray v. Laws*, 51 F.3d 426, 431 (4th Cir. 1995), has, alas, been proven true. See also *Duke*, 127 F.3d at 974 n.4 ("Other courts have simply pointed out the difficulties and uncertainties in applying the Eleventh Amendment analysis, particularly after *Hess*."). As the Fourth Circuit observed, *Hess* was by no means clear in whether its test should even notionally apply to single state entities. See *Gray*, 51 F.3d at 432. One court of appeals has held, in contrast to the First Circuit's decision below, App. 17a, that it does not. See *Vogt v. Bd. of Comm'rs of the Orleans Levee Dist.*, 294 F.3d 684, 689 n.2 (5th Cir. 2002); *Pillsbury Co. v. Port of Corpus Christi Auth.*, 66 F.3d 103, 104-05 (5th Cir. 1995).

The Fourth Circuit has also noted that this Court in *Hess*

> never indicated whether the considerations of the state treasury and state sovereignty are generally dispositive if they both suggest the same conclusion, regardless of the conclusion suggested by the other factors. Similarly, although the Court identified protection of state treasuries and respect for state sovereignty as the "prime guide[s]" when the various factors are in conflict, it did not ascribe relative weights to these factors or explain the interrelationship of these two considerations. Finally, the Court explained neither when nor how the other

> "relevant considerations" factor into the central inquiry into the action's effect on the state's treasury and sovereignty.

51 F.3d at 433 (citations omitted). Some courts of appeals have likewise noted that *Hess*'s intended impact on pre-existing circuit case law on arm-of-the-state determinations was by no means clear. See, e.g., *Alkire v. Irving*, 330 F.3d 802, 811 (6th Cir. 2003) ("we now recognize that the question of who pays a damage judgment against an entity as the most important factor in arm-of-the-state analysis, though it is unclear whether it is the only factor or merely the principal one."); *Brotherton v. Cleveland*, 173 F.3d 552, 561 (6th Cir. 1999); *Harter v. Vernon*, 101 F.3d 334, 344-45 (4th Cir. 1996) (Luttig, J., dissenting).

b. The circuits are thus divided as to the proper application of *Hess*'s two-step analysis, and, particularly, the relative weighing of factors under the first, "control" prong. Some, like the First Circuit, have articulated six or seven factors of control, and have required that all must be in accord before arm-of-the-state status will be conferred on an entity. See, e.g., *Wojcik v. Mass. State Lottery Comm'n*, 300 F.3d 92, 99 (1st Cir. 2002); *McGinty v. New York*, 251 F.3d 84, 95-96 (2d Cir. 2001); *Mancuso v. N.Y. State Thruway*, 86 F.3d 289, 293 (2d Cir. 1996). Other courts of appeals have tended to decrease and simplify the number of factual considerations, and not required unanimity among them in order to make a finding of arm-of-the state status. See *Carter v. City of Philadelphia*, 181 F.3d 339, 347 (3d Cir. 1999) (three factors); *Kitchen v. Upshaw*, 286 F.3d 179 (4th Cir. 2002) (three factors); *Eason v. Clark County Sch. Dist.*, 303 F.3d 1137, 1141 (9th Cir. 2002) (five factors); *Sturdevant v. Paulsen*, 218 F.3d 1160, 1166 (10th Cir. 2000) (four factors, although noting that other circuits "have considered additional factors."); *Manders v. Lee*, 285 F.3d 983, 993 (11th Cir. 2002) (four factors).

Yet other courts of appeals have made crystal clear that the factors are a balancing test; none is decisive, and not all need to be satisfied before arm-of-the-state status is confirmed. See *Perez v. Region 20 Educ. Ctr.*, 307 F.3d 318, 327 (5th Cir. 2002) ("No one factor is dispositive, though we have deemed the source of an entity's funding a particularly important factor because a principal goal of the Eleventh Amendment is to protect state treasuries. An entity need not show that all of the factors are satisfied; the factors simply provide guidelines for courts to balance the equities and determine if the suit is really one against the state itself.") (citing *Hudson v. City of New Orleans*, 174 F.3d 677, 682 (5th Cir.1999)).

To some degree, the First Circuit's misapprehension of the *Hess* factors, and their application to PRCCCC, may be seen as arising from this Court's later case law altering the terrain of Eleventh Amendment jurisprudence. While this Petition confines itself to drawing the Court's attention to arm-of-the-state determinations, it nevertheless may require the Court to consider whether *Hess* should be read, as the First Circuit held, App. 30a, to be primarily focused on whether a judgment against an entity will be paid by the state treasury, and thus whether other, more subtle, dignitary interests of states can be discounted or ignored altogether. The question thus becomes whether *Hess*'s indication that potential exposures of state treasuries as the "most salient factor" in arm-of-the-state analysis, 513 U.S. at 48, means that dignitary concerns can be sublimated for single-state special-purpose public corporations.

3. Third, the court below effectively ruled that special-purpose public entities that planned or provided health care services would never qualify as arms-of-the-state because they were engaged in an essentially private sector activity. App. 27a-29a. The court of appeals held that "[nothing] distinguish[es] [PRCCCC] from a private sector hospital . . . .

and nothing about PRCCCC marks it as serving a uniquely governmental function." App. 29a. Although the function a public entity serves is but one component of the *Hess* factors, see 513 U.S. at 44-46 ("whether the entity's functions are readily classifiable as state functions or local or non-governmental functions. . . ."), the First Circuit's analysis, if widely adopted, would categorically disqualify a sweeping array of public health initiatives pursued by states.

a. The decision below appeared to studiously ignore the full range of functions that the Commonwealth legislature invested the PRCCCC. As the organic act for the PRCCCC provided, the entity was to have "the responsibility of framing or executing public policy with regard to the planning, organization, operation and administration of the cardiovascular services to be provided in Puerto Rico." 24 P.R. Laws Ann. § 343b (2000); App. 58-59a. Additionally, the statutory preamble clearly indicated that the PRCCCC was intended "for the purpose of eliminating or mitigating the ailments of cardiovascular patients as well as to promote teaching, study, research and the intellectual development of the health care professionals in this highly specialized field of medicine." Act of June 30, 1986, No. 51, 1986 P.R. Laws 171-72.

The First Circuit's opinion also deliberately minimized the connections between PRCCCC and other components of the Commonwealth government. As reflected in the composition of the PRCCCC Board, the hospital is closely affiliated with the Commonwealth's Department of Health, whose Secretary (a cabinet officer) serves as PRCCCC's Board Chair. See 24 P.R. Laws Ann. § 343c (2000); App. 61a-62a. Likewise, the Executive Director of the Medical Services Administration, primarily charged with the policy and management of the Commonwealth's public health system, also serves. Lastly, the hospital's functions as a training site and research center for

cardiac care are reflected in its connections with the University of Puerto Rico Medical Sciences Campus and Medical School. Each of these entities has been ruled to be an arm-of-the-Commonwealth. See *Pinto v. Universidad de Puerto Rico*, 895 F.2d 18 (1st Cir. 1990); *Rodriguez Diaz v. Sierra Martinez*, 717 F. Supp. 27, 29-31 (D.P.R.1989). In short, to characterize PRCCCC as merely a "private sector hospital," disengaged from a "uniquely governmental function," App. 29a, is to profoundly misunderstand the role and function of state public health entities.

b. State-sponsored teaching and research hospitals nonetheless pose special challenges to the application of this Court's arm-of-the-state jurisprudence. Whether erected and maintained through state university systems, or (as in this case) through independent entities, such clinics or hospitals have drawn widely disparate Eleventh Amendment treatment by the courts of appeals. Especially when a facility is created by state (as opposed to county or municipal) legislation, the tendency has been for federal courts to look at the purposes of the institution, and not to categorically reject (as the First Circuit did here) its qualification for arm-of-the-state status simply because it was engaged in the provision of health care services. See *Laje v. R.E. Thompson Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982) (hospital was a municipal entity, not a state institution); *Wheeler v. Mental Health & Mental Retardation Auth. of Harris County, Tex.*, 752 F.2d 1063, 1072 (5th Cir. 1985) (same); *Ky. River Comm. Care, Inc. v. Nat'l Labor Relations Bd.*, 193 F.3d 444, 449-50 (6th Cir. 1999) (same); *Crosby v. Hosp. Auth. of Valdosta & Lowndes County*, 93 F.3d 1515, 1522-23 (11th Cir. 1996) (same). Nevertheless, some circuits, like the First in the decision under review here, have required that nearly all of the budget of a clinic or hospital come from state coffers before arm-of-the-state status will be

extended. See *Wheeler*, 752 F.2d at 1072 (a significant amount of "legislatively appropriated funds does not in and of itself render . . . [the center] an arm of the state.").

The First Circuit's opinion, nonetheless, is manifestly in conflict with those decisions of other courts of appeals which have held that medical clinics that are integrated into the state's public health system are endowed with arm-of-the-state status and Eleventh Amendment immunity. See *Darlak v. Bobear*, 814 F.2d 1055, 1059-60 (5th Cir. 1987). Moreover, even where an entity participates in such a health care system as a payment agent or even as an intermediary for purposes of health insurance reimbursements or indemnifications, such an entity has been regarded by some circuits as an arm-of-the-state. See *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1311-12 (11th Cir. 2000) (private third-party administrator of state employee health insurance plan was an arm-of-the-state).

4. Fourth, the First Circuit appeared to impose an impossibly stringent requirement that a state must provide most, if not virtually all, of the operating funds for an entity, if it is to qualify for arm-of-the-state status. Despite finding that PRCCCC had received, at various times in the past decade, nearly two-thirds of its funding from Commonwealth sources, App. 34a-35a, the court of appeals nonetheless ruled that because Puerto Rico's current contribution was (as of FY 2001) no more than 26 percent, such meant that it could not be an arm-of-the-state. Although ostensibly relying on this Court's ruling in *Mt. Healthy*, 429 U.S. at 280, in fact, the First Circuit applied its own pre-*Hess* precedents. App. 36a (citing *Metcalf & Eddy*, 991 F.2d at 941), essentially requiring that the constituent instrument of a public corporation unequivocally specify the state's legal duty to guarantee payment of the entity's debts. See App. 32a-34a.

a. Nothing in this Court's jurisprudence requires, or even suggests, a cramped temporal view in determining an entity's dependence on public funding. If that were the case, an entity could be qualified and disqualified as an arm-of-the-state, depending on what a court regards as the relevant fiscal year or the particular period that an action arises. Indeed, this Court's case law demands just the opposite approach: a test that looks at the entire fiscal history of a special-purpose public corporation, in light of the particular dignity interests that obtain with a state seeking to establish and maintain the entity. Moreover, other circuits have more generally framed the issue as one of whether the public entity is really self-sufficient, or regularly relies upon infusions of state funds in order to operate. See *Lizzi v. Alexander*, 255 F.3d 128, 132 (4th Cir. 2001); but see *Wheeler*, 752 F.2d at 1072 ("a significant amount of "legislatively appropriated funds does not in and of itself render . . . [the center] an arm of the state.").

A more contextual examination of an entity's funding situation and fiscal history is consistent with this Court's observation in *Hess* that only entities that are truly self-sufficient, and so do not rely *at all* on public funding, are undeserving of arm-of-the state status. See 513 U.S. at 50 ("There is no such requirement where the agency is structured, as the Port Authority is, to be self-sustaining.") (citing *Royal Caribbean Corp. v. Puerto Rico Ports Auth.*, 973 F.2d 8, 10-11 (1st Cir. 1992) (Breyer, C.J.)). The First Circuit's stringent requirement of an entity's continuous, contemporaneous, and crushing dependence on state financial resources in order to be eligible for arm-of-the-state status is thus untenable.

b. The First Circuit's exaltation of the financial dependence prong of the *Hess* test, to the exclusion of the wider demands of preserving the state's dignity interests as manifested in its public bodies, also runs contrary to both the majority and

dissenting opinions in *Hess* and in later Eleventh Amendment rulings of this Court. This was made express in *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997), where the Court held that it is improper to convert the arm-of-the-state "inquiry into a formalistic question of ultimate financial liability." Id. at 431. Additionally, this Court noted that "it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant." Id. Decisions by other courts of appeals have confirmed that *Regents* requires courts to examine the potential legal liability of states for the judgments imposed against their entities, and not simply whether state funds will actually pay the judgment. See *Manders*, 285 F.3d at 993; *Shands Teaching Hosp.*, 208 F.3d at 1313.

Just as significantly, the First Circuit's ruling contradicts those of other courts of appeals which have held that even under *Hess*'s second prong, exclusive reliance on impact of a judgment against the entity on the state treasury is improper. Instead, these courts have held that a state's dignity interests can still be implicated even if the state's financial support does not rise to a level consistent with what one might expect to be complete control. See *McGinty*, 251 F.3d at 96; *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 224 (4th Cir. 2001). The result reached by the First Circuit amply illustrates the point enunciated by the Tenth Circuit that "[w]hile the Supreme Court has indicated that [the state treasury's liability for judgments] is the most 'salient' factor, it is also among the most difficult to apply. This . . . highlights the confusion in this area of Eleventh Amendment jurisprudence." *Duke*, 127 F.3d at 980.

5. If left unreviewed, the decision below will represent a further fracture and fragmentation of this Court's arm-of-the-state jurisprudence. A court of appeals opinion which presented

any one of the four pathologies discussed above would merit this Court's attention. That all four are present here, with each reflecting discordant and divergent treatment in circuit precedents, strongly counsels for the Court's intervention here. Such is necessary to clarify and resolve the applicable standards to be used in arm-of-the-state cases, especially those which should implicate substantial deference to a state's legislative and policy decisions in structuring entities entitled to Eleventh Amendment immunity. Particularly when it comes to policy-making, planning, and provision of specialized health care services, and coordinate training and research in those areas, states should be entitled to experiment with creative approaches and strategies in creating special-purpose public entities to meet the public's needs.

This case thus presents a stark example of the disarray which arm-of-the-state jurisprudence finds itself today, substantially transformed in the courts of appeals after this Court's holding in *Hess*. The ruling below will have the effect of disqualifying many Puerto Rico public entities as arms-of-the-state, as well as those bodies similarly situated elsewhere. If widely followed, it will inevitably distort and subvert a gracious and subtle doctrine of respect and deference to the creative political decisions of states in creating useful public entities into a formal and mechanical exercise which exalts form over substance, and which permits federal judges to substitute their judgment for the legitimate political decisions of state legislatures and officials.

CONCLUSION

The Petition ought to be GRANTED.

Respectfully submitted,

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